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No. 79-2073

In the Supreme Court of the United States

OCTOBER TERM 1979

RUSSELL J. BEHLING and BEHLING'S TRANSFER, INC.,

Petitioners,

vs.

ROBERT E. SCHMIDT, JR., RICHARD M. EVANS and ROBERT L. SABOW, d/b/a BROWN DEER DEVELOPMENT COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Plaintiffs-Respondents (Lessor) and the Defendant-Appellant, Russell J. Behling (Tenant) entered into a written Lease Agreement dated June 20, 1974, with a rental modification agreement executed December 30, 1974.

Behling entered into possession on April 15, 1975. Mr. Schmidt, of Brown Deer Development Company, testified on the calculation of the rental per month, including rent, taxes and insurance, without contradiction from the defen-

dant. Within the first few months the tenant fell behind on rental payments which accrued at the rate of $10,418.20 monthly (for rental, tax escrow and insurance). As of September 1, 1976, the rental deficiency was $90,013.12, plus a real estate tax deficiency of more than $22,000.00, plus an insurance escrow deficiency.

A construction cost overage was also the responsibility of the tenant pursuant to the terms of the lease and modification agreements. This overage was to be paid by the tenant at the rate of $6,800.00 per month for 12 months, but was reduced by mutual agreement to $4,000.00 per month until fully paid. But as of September 1, 1976, the construction overage reimbursement was also in arrears. Nevertheless, the Lessors as owners were liable upon their mortgage, so they had to keep the mortgage payments current. Expenses for the owners-lessors accrued at the rate of $293.00 per day.

Earlier in 1976 the plaintiffs brought an eviction action in the County Court for Milwaukee County. The trial court in the instant case took judicial notice of the previous eviction action. The tenant asserted no defense in that previous action and entered into a stipulation agreeing to pay certain amounts for a delay in the issuance of a Writ of Restitution. In addition to being substantially in default in rental by April 1976, the defendant admitted paying nothing after April 1976, other than a tender of $2,000.00 which was refused.

The Lessors elected to terminate the lease, serving a ten-day notice in accordance with paragraph 12 of the Lease. The notice was filed with the court on the return date of the eviction summons, October 6, 1976, together with proof of service consisting of Behling's own signature on the receipt.

On the return date of the eviction summons the tenant was represented by Attorney Eli Frank. Behling was present in the courthouse but did not appear at the short conference between the trial judge and the attorneys. No request was made for a jury trial. Ten days was agreed upon for filing of an answer, and the trial date was also agreed upon. At no time within the next twelve days did the defendant either request a jury trial or file an answer.

The next hearing was conducted at the request of a new attorney for the tenant, Attorney Norman Skogstad, upon less than 24 hours notice, at which hearing Mr. Skogstad requested an adjournment. Four days before the answer was due, the defendant filed a consent for substitution of attorneys, but no demand for a jury was filed with it. On the day before trial, and *after* an adjournment had been denied, counsel for defendant made the first oral request for a jury trial.

On the following day, October 20, 1976, the defendant appeared in person and with another new attorney, Robert Sutton, and the case proceeded to trial only upon the first cause of action for eviction, for a determination as to whether or not the owners were entitled to possession of the premises. This would involve the question of whether or not a substantial default had been established.

After trial of several days, followed by a Court view of the premises and by oral argument, the trial Court entered his findings and decision on October 25, 1976 in favor of Respondents herein.

The tenant filed a notice of appeal to the Circuit Court of Milwaukee County on or about October 26, 1976, and the trial Court subsequently granted the tenant an additional six days stay of the Writ of Restitution pending

filing of a bond in the amount of $25,000.00. This stay of the Writ of Restitution was ordered over the objection of counsel for the plaintiffs.

The tenant failed to file a bond, and the Writ of Restitution was executed by the Sheriff of Milwaukee County within the week following November 1, 1976.

After eviction by the Sheriff, the defendant attempted to regain possession of the premises without process and it was necessary for the trial Court to enter a temporary restraining order followed by an injunction *pendente lite* ordering the defendant to stay away from the premises.

The appeal to the Circuit Court was decided upon the record and upon the briefs of counsel for the parties. On April 20, 1977, the Circuit Court, Hon. William R. Moser, presiding, entered a memorandum decision affirming the trial court's decision granting a judgment of eviction. A written order for judgment affirming eviction was subsequently entered, followed by entry on June 1, 1977, of the judgment affirming eviction. The decision of the Circuit Court was not printed in Petitioner's Appendix. It appears herein as the first item of Respondents' Appendix.

The Petitioner then appealed to the Wisconsin Supreme Court which affirmed the decisions below. A. App. 1-20.

REASONS FOR DENYING THE WRIT

I.

JURY TRIAL WAS WAIVED

Under Wisconsin law a party in a civil action is entitled to a trial by jury unless he waives it. That right is by virtue of Article I, Section 5 of the Wisconsin Constitution:

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law . . .

The statutorily defined method for waiver of the right to trial by jury in this type of civil action is set forth in Section 299.21(3), Wisconsin Statutes. That statute, held constitutional in *State ex rel Prentice* v. *County Court,* 70 Wis. 2d 230, 239, 234 N. W. 2d 283 (1975), requires an affirmative request for jury trial or that right is forever waived.

The appellant never made a timely or proper request for trial by jury. Instead, appellant's first request for jury trial was made the day before the scheduled trial date, and only after appellant's requests for an adjournment were denied. Clearly, appellant's request was dilatory.

Moreover, appellant's right to trial by jury has been fully protected and maintained by the Wisconsin courts. The request for jury trial was denied in conformity with due process as provided by the Wisconsin Constitution

and the Wisconsin statutes. As stated by Judge Moser of the Circuit Court on the intermediate appeal:

> In this case a jury trial was waived pursuant to Article I, Section 5 of the Wisconsin Constitution and Section 299.21(3)(a)(b), Wisconsin Statutes, for the following reasons:
>
> 1. No written request for jury trial was presented to the trial court as required by Section 299.21(3)(a).
>
> 2. The date the court set for joinder of issue was October 18, 1976. Mr. Saichek states he waived that date for Mr. Skogstad to October 19, 1976, at 5:00 o'clock p.m. There was no joinder of issue on that date as required for the defense to be entitled to a jury trial pursuant to Section 299.21(3)(a).
>
> 3. There is no evidence in Case No. A995-973 of the County Court or Case No. 477-777 of the Circuit Court that there was compliance with the requirement to pay a jury fee, suit tax, or clerk's fees as required by Section 299.21(3)(b). (Resp. App. 7)

The Wisconsin Supreme Court, in affirming that decision, stated that:

> Defendant did not meet the statutory requirements for requesting a jury trial and therefore waived the right to jury trial. There is nothing in the record to support defendant's assertion that their constitutional right to a jury trial has been violated. (A. App. 15)

In the face of these findings, appellant urges that whether or not Section 299.21(3) has been "literally" complied with, his request for jury trial should have been granted to comport with due process. However, appellant cites

no cases to support this position and relies only upon a general appeal to due process. Moreover, the Milwaukee County Court, the Circuit Court of Milwaukee County, and the Supreme Court of the State of Wisconsin all properly found that the requirements of due process had been met. To accept appellant's argument would, in effect, defeat due process by rendering the statutory requirements of Wisconsin meaningless. Appellant has made no claim that the statutory requirements were unreasonable or arbitrary.

CONCLUSION

Appellant has failed to comply with the statutory requirements of Section 299.21(3) and thereby waived his right to trial by jury. The later requests for trial by jury were properly denied by all Wisconsin courts in accord with the requirements of due process. For the foregoing reasons, respondent respectfully requests that this court deny the appellant's petition for certiorari.

Respectfully submitted,

SAICHEK & HERTEL, S. C.
Attorneys for Respondents

Of Counsel:
DAVID A. SAICHEK

APPENDIX

RESPONDENTS' APPENDIX

APPENDIX A

STATE OF WISCONSIN — CIRCUIT COURT
MILWAUKEE COUNTY

ROBERT E. SCHMIDT, JR., RICHARD M. EVANS and ROBERT L. SABOW, d/b/a BROWN DEER DEVELOPMENT COMPANY,

Plaintiffs-Respondents,

vs.

RUSSELL J. BEHLING and BEHLING'S TRANSFER, INC.,

Defendants-Appellants.

No. 447-777

MEMORANDUM DECISION

This is an appeal from an eviction judgment rendered by the Honorable Elliot N. Walstead in which there were appearances in his court on the following dates:

October 6, 1976	October 25, 1976
October 19, 1976	October 27, 1976
October 20, 1976	

The judgment ousted the defendant Russell J. Behling and Behling's Transfer, Inc. from premises located at 5400 West Brown Deer Road, and the trial court adjourned the issue of damages for a later proceeding. From this judgment the defendant appeals and raises four issues.

DID THE COUNTY COURT OF MILWAUKEE COUNTY HAVE JURISDICTION ON THE COMPLAINT AS FILED?

The complaint was filed October 4, 1976, and is entitled complaint-eviction and money judgment. The first cause of action requests eviction, the second cause of action seeks damages. The Ad Damnum clause request removal of defendants from the premises and restoration of the premises to the plaintiff and money damages.

Plaintiffs' Exhibit No. 1 reads in part as follows:

"12. *DEFAULTS*: It is mutually agreed that, in the event Lessee shall default in the payment of rentals when due, Lessor shall forward written notice of such default by certified mail, return receipt requested, or by personal delivery, addressed to Lessee as hereinafter set forth, and failure on the part of Lessee to cure such default within 10 days after the date of receipt of said notice shall, at the option of Lessor, work a forfeiture of this Lease. In case Lessee so continues the default of any rental payment due after notice, Lessee shall not be released of any liability for rent hereunder by reason of Lessor's repossession of the Premises or by Lessor's taking any other legal proceedings available to it upon such default. Nor shall a forfeiture of this Lease release Lessee from continuing liability for the payment of rent as herein provided. Rentals shall include taxes and insurance premium escrows. If Lessor, by reason of Lessee's late payment is required to pay lender late penalty, Lessee agrees to pay same. . . ."

The facts in this case clearly establish a notice of default. A letter dated September 13, 1976, was forwarded to Russell J. Behling and Behling's Transfer, Inc. by certified mail, return receipt requested, and that Russell J. Behling acknowledged receipt of same September 15, 1976, as is evidenced by the postal receipt attached to the copy of said letter.

In *Continental Grain Co.* v. *Afram Brothers Co.*, 35 Wis. (2d) 676 (1967), Justice Wilkie in pages 679-681 cites the general law of forfeiture and reentry in real estate leases; albeit, that particular case involves the lease of a chattel (a boat or a ship). On page 680 Wilkie states:

> "More specifically, a lessee does not forfeit his rights in a lease for nonpayment of rent. The rule is stated in 32 Am. Jur., Landlord and Tenant, p. 723, sec. 852, as follows:
>
> > "The nonpayment of rent, in the absence of a provision therefor in the least or of a statute so declaring, does not operate as a forfeiture of the term or confer upon the lessor any right of re-entry, although there is, of course, no question that provisions in leases for a term of years for forfeiture or right to reenter for nonpayment of rent are valid and enforceable.' "

Section 704.17 Wis. Statutes reads in part as follows:

> "704.17 Notice terminating tenancies for failure to pay rent or other breach by tenant.
>
> (5) CONTRARY PROVISION IN THE LEASE. Provisions in the lease or rental agree-

ment for termination contrary to this section are invalid except in leases for more than one year."

The complaint calls it a lease, Exhibit No. 1 calls it a lease, Judge Walstead found it was a lease. This court agrees with Judge Walstead's determination that there was a lease for a term of 25 years.

Paragraph 12 of the lease provides for a 10-day certified, return receipt requested notice of default, requesting curing of the default in that period of time or there would be a forfeiture of the lease. *Continental Grain Co.* v. *Afram Brothers Co., supra,* stands for the principle of law that such terms in a written lease of real property are enforceable. Section 704.17(5) Wis. Stats. provides for enforcement of such terms in leases for a term of more than one year.

Section 299.01 Wis. Statutes states:

"299.01 Applicability of Chapter. Subject to the limitations of ss. 299.11 and 299.12, the procedure in this chapter shall be used in county court in the following actions:

(1) EVICTION ACTIONS. Actions for eviction as defined in s. 299.40 regardless of the amount of rent claimed therein.

Judge Walstead is and was at all times herein a County Judge, surcharged with the responsibility of hearing such eviction cases. He had jurisdiction to hear and determine all issues in this case of eviction pursuant to Section 299.01 and 299.40 Wis. Stats.

WAS IT ERROR FOR THE COURT TO DENY DEFENDANT'S MOTION FOR TRIAL BY JURY?

10/15/76 Russell J. Behling received notice of default.

9/30/76 Russell J. Behling was personally served with the summons and complaint in the action.

10/ 1/76 Behling's Transfer, Inc. was served with a summons and complaint in this action.

10/ 6/76 Was the return date in Judge Walstead's court at which time Mr. Saichek appeared for the plaintiff and Eli Frank appeared for the defendants, at which time Judge Walstead granted the defendant 12 days to answer the complaint due October 18, 1976, and set the trial of the matter for October 20, 1976, at 9:30 a.m.

10/14/76 A substitution of defendants' counsel was filed in Judge Walstead's court, substituting any lawyer for Eli Frank.

10/19/76 At 8:30 a.m. in Judge Walstead's court Norman Skogstad appeared for the defendant and Mr. Saichek appeared for the plaintiff by mutual agreement in Judge Walstead's court. Mr. Skogstad asked for an adjournment (p. 13). He requested another adjournment (p. 18). He requested another adjournment (p. 25), at which time the request for adjournment was denied. Mr. Skogstad then requested a jury trial (First request for a jury trial in the matter) basing his demand for jury on the 1st, 14th, and 7th amendment; and again on p. 25, Mr. Skogstad requested a further adjournment, which was denied.

10/27/76 This was the date Judge Walsted set for trial of the matter, and Mr. Sutton appeared and was retained by Mr. Behling

that date (p. 3). Mr. Sutton requested to file a responsive plea since no responsive plea was on file, and he was aware that the time for filing a responsive plea had past by two or three days. He further requested a jury trial (p. 4). Mr. Saichek argues that he gave Mr. Skogstad until 10/19/76 at 5:00 p.m. to file a responsive plea. The court sets the eviction trial for this date, October 20, 1976, (p. 8) and allows defendant time to answer regarding damages owing, if owed. Mr. Behling testified he wanted a jury trial (p. 19). After hearing arguments, the court denied a jury trial (p. 21).

This court will turn to Section 299.01, the Wisconsin Statutes, which reads in part as follows:

"299.01 Applicability of Chapter. Subject to the limitations of ss. 299.11 and 299.12, the procedure in this chapter shall be used in county court in the following actions:

(1) EVICTION ACTIONS. Actions for eviction as defined in s. 299.40 regardless of the amount of rent claimed therein."

"299.40 Eviction actions. (1) WHEN COMMENCED. A civil action of eviction may be commenced by a person entitled to the possession of real property to remove therefrom any person who is not entitled to either the possession or occupancy of such real property.

(2) JOINDER OF OTHER CLAIMS. The plaintiff may join with his claim for restitution of the premises any other claim against the defendant arising out of his possession or occupancy of the premises.

(3) EXCEPTION. Nothing in this section shall affect ss. 704.09(4) and 704.19."

"299.21 Trial. (1) DETERMINATION OF METHOD OF TRIAL. In the absence of a jury demand, trial shall be to the court.

(3) TRIAL BY JURY. (a) Any party may, upon payment of the fees specified in par. (b), file a written demand for trial by jury. If no party demands a trial by jury, the right to trial by jury is waived forever. In eviction actions, such demand shall be filed at or before the time of joinder of issue; in all other actions within 20 days thereafter.

(b) The fee for a jury is $24, plus an additional amount as suit tax which will result in a suit tax payment of the amount which would have been payable had the action been commenced in circuit court and additional clerk's fees of $6."

Article 1 s. 5, Wisconsin Constitution:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."

In this case a jury trial was waived pursuant to Article 1 Section 5 of the Wisconsin Constitution and Section 299.21(3)(a) and (b), Wisconsin Statute, for the following reasons:

1) No written request for jury trial was presented to the trial court as required by Section 299.21 (3)(a).

2) The date the court set for joinder of issues was October 18, 1976. Mr. Saichek states he waived that date for Mr. Skogstad to October 19, 1976, at 5:00 p.m. There was no joinder of issue on that date as required for the defense to be entitled to a jury trial pursuant to Section 299.21(3)(a).

3) There is no evidence in Case No. A995-973 of the County Court or Case No. 447-777 of the Circuit Court that there was compliance with the requirement to pay a jury fee, suit tax, or clerk's fee as required by Section 299.21(3)(b).

WAS PROPER NOTICE FURNISHED THE DEFENDANT PURSUANT TO SECTION 704.17, WIS. STATS.?

This court is of the opinion that proper notice was given to the defendant as under Paragraph 12 of the lease, which is Exhibit No. 1, and Section 704.17(5), and pursuant to *Continental Grain Co.* v. *Afram Brothers Co.*, 35 Wis. (2d) 676.

DID THE COURT ERR IN ITS RESOLUTION OF THE ISSUES OF CREDIBILITY RAISED BY THE EVIDENCE PRESENTED?

This court would turn to the case of *Mitchell* v. *Western Casualty & Surety Co.*, 30 Wis. (2d) 419 on page 421, where Justice Hallows states as follows:

> "Since the trial court tried the case without a jury, its findings will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence and it is not necessary the evidence in support of the findings constitutes the great weight or clear preponder-

ance of the evidence. Nor is it sufficient that there is evidence to support a contrary finding. To command a reversal, such evidence although sufficient to support a verdict must constitute the great weight and the clear preponderance of the evidence."

And he further goes on to state in the same case:

"These rules are of such ancient origin and through acceptance at every term of court they have attained the status of canons of judicial review."

There is no question of controversy between the testimony of the witnesses for the plaintiff and the defendant. The above cited case required that if an appellate court is to upset the findings of the trier of the facts, it must find those facts "contrary to the great weight and clear preponderance of the evidence." This court can make no such findings.

Judgment is affirmed with costs and disbursements of this action.

Dated at Milwaukee, Wisconsin, this 20th day of April, 1977.

BY THE COURT,

/s/ *William R. Moser*
William R. Moser
Circuit Judge

APPENDIX B

WISCONSIN STATUTES

299.21 *Trial.* (1) DETERMINATION OF METHOD OF TRIAL. In the absence of a jury demand, trial shall be to the court.

(3) TRIAL BY JURY. (a) Any party may, upon payment of the fees specified in par. (c), file a written demand for trial by jury. If no party demands a trial by jury, the right to trial by jury is waived forever. In eviction actions, the demand shall be filed at or before the time of joinder of issue; in all other actions within 20 days thereafter.

(b) In counties establishing at least one part-time or full-time court commissioner position under s.757.68(1)(b), except in eviction actions which shall be governed by par. (a), demand for trial by jury shall be made at the time a demand for trial is filed. If the party requesting a trial does not request a jury trial, any other party may request a jury trial by filing such request with the court and mailing copies to all other parties within 15 days from the date of mailing of the demand for trial or the date on which personal notice of demand is given, whichever is applicable. If no party demands a trial by jury, the right to trial by jury is waived forever. The fees specified in par. (c) shall be paid when the demand for a trial by jury is filed.

(c) The fee for jury is $24, plus an additional amount to suit tax which will result in a suit tax payment of the amount, which would have been payable had the action been commenced, under chs. 801 to 807 and additional clerk's fees of $6.